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on Strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings

Committee on Civil Liberties, Justice and Home Affairs

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I. Presumption of innocence and the level of fundamental rights as enshrined in the Charter

The presumption of innocence is a pillar of modern democratic criminal procedures based on respect for fundamental rights. As such, it grew out of the historical experience with the inquisitorial procedure as well as totalitarian systems of the 20th century based on a presumption of guilt and the permission to use coercion against the suspect. Unfortunately, such concept is also today under threat by, inter alia, instruments of the so-called "preventive state" (mass storage of data and profiling of population), and the introduction of parallel "civil/administrative" proceedings to criminal proceedings, where the presumption does not apply.

As a principle it has three direct consequences for rights of the suspect in a criminal procedure: (a) the right to remain silent; (b) the burden of proof is on the prosecution; and (c) *in dubio pro reo* (in doubt for the defence). Due to such an importance of the presumption of innocence the Rapporteur welcomes a common EU harmonisation instrument in that regard. However, such an instrument has to introduce very high common standards and shall not reflect only the lowest common denominator based on the ECHR. The Rapporteur points out in that regard that Article 52(3) of the EU Charter of Fundamental Rights explaining the relationship between the Charter and the ECHR states that "*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.*"

Consequently, the Charter allows the introduction of much higher fundamental rights standards in comparison with the ECHR. In that regard the Rapporteur points out the ECJ *Melloni* judgement (C-399/11), whereby the Court concluded as regard the interpretation of Article 53 of the Charter that the adoption of common EU standards in criminal procedure prevents the adherence to higher national constitutional standards as a non-recognition ground in mutual recognition. To prevent contradictions between national constitutional standards in the field of criminal procedural law that are higher than the ECHR minimum, on one side, and the Charter and EU harmonisation rules, on the other side (to prevent a "*Solange*" dispute between EU law and national constitutional law as regards fundamental rights), the rights from the Charter should be interpreted as high as possible and the EU common harmonisation should introduce a high standard of protection. Such a high standard used in EU instruments harmonising procedural rights is also essential to justify EU competence in the field of criminal law in accordance with the principle of subsidiarity.

II. Initial evaluation of the Commission proposal

The current Commission proposal fulfils the above mentioned task only partially. On the positive side the Commission clearly includes a prohibition of public references of guilt before conviction by public authorities (Article 4), a standard clearly established since the ECtHR judgment in the case of *Allenet de Ribemont v. France (1995)*. At the same time a clear reference is provided that the exercise of the right to remain silent and the right not to incriminate oneself shall not be used later against the suspect or accused and shall not be considered as a corroboration of facts (Articles 6(3) and 7(3)). In that regard the Commission

took account of the criticism following its 2006 Green paper on the presumption of innocence where negative inferences were allowed from the right to remain silent based on the ECHR decision in the *John Murray v. UK* (1996) case.

The rapporteur welcomes such an improvement of the level of protection of the right to remain silent as an absolute right of the suspect or accused person in line with other EU legal harmonization instruments, such as the Directive 2012/13/EU on the right to information in criminal proceedings. The Directive includes a kind of "EU Miranda warning system" whereby each suspect has to be given a prior warning by the authorities, including the right to remain silent, as a prophylactic rule to protect the right to remain silent (see in that regard also the justification of the US Supreme Court in *Miranda v. Arizona, 1966*). Such an improvement also reflects the dissenting opinion in the ECtHR *John Murray* case stating, inter alia, that: "*The right to silence is a major principle. Any constraint which has the effect of punishing the exercise of this right, by drawing adverse inferences against the accused, amounts to an infringement of the principle.*"

Unfortunately, the same high-standard approach is not fully followed in other parts of the Commission proposal, such as regards the issue of compulsion (Recital 17), presumptions on shifting the burden of proof (Article 5) and a low standard on admissibility of evidence (Article 6(4), Article 7(4) and Article 10).

(a) Clear prohibition of the use of compulsion

The Commission proposed the following text in Recital 17: "*Any compulsion used to compel the suspect or accused person to provide information should be limited. To determine whether the compulsion did not violate those rights, the following should be taken into account, in the light of all circumstances of the case: the nature and degree of compulsion to obtain the evidence, the weight of the public interest in the investigation and punishment of the offense at issue, the existence of any relevant safeguards in the procedure and the use to which any material so obtained is put. However, the degree of compulsion imposed on suspects or accused persons with a view to compelling them to provide information relating to charges against them should not destroy the very essence of their right not to incriminate one-self and their right to remain silent, even for reasons of security and public order.*"

Such wording is unclear, could lead to abuses and therefore should be deleted. It should be clear from the text that any use of physical or psychological violence or threats against the accused person, torture and inhuman and degrading treatment are prohibited as they violate human dignity and the right to a fair procedure. Unfortunately, the fight against terrorism as well as the fight against serious crime has shown that even modern democracies are not immune against a fallback to methods of very different past times (see for example, ECHR Court cases such as *Ireland v. UK*, A. no. 5310/71, about the use of "special" interrogation techniques, *Gäfgen v. Germany*, 2005, about the use of physical threats by police, *El-Masri v. Macedonia*, 2012, as regard extraordinary renditions, or *El-Haski v. Belgium*, 2012 on the prohibition of any evidence obtained by torture). In that regard the Rapporteur would like to point out that Article 3 ECHR on the prohibition of torture, inhuman and degrading treatment is an absolute right from which no derogation is possible in accordance with Article 15 ECHR, as "*Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies.*"

Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation" (ECtHR, Saadi v. Italy, 2008, para. 127). Consequently, also evidence stemming from such behaviour shall not be admissible, as past experience in criminal law has clearly shown that only disciplinary procedures against officers cannot replace an efficient exclusionary system to provide for an effective legal remedy, as will be explained further bellow.

At the same time it is already sufficiently clear from the Commission text (see Recital 18) that the collection and use of non-testimonial evidence (blood and urine samples, DNA, fingerprinting, photographing, to write or speak for identification purposes, etc.) is allowed. It does not violate the privilege against self-incrimination principle, in line with the ECtHR judgment in *Saunders v. UK*, 1996, whereby such a privilege "*does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing*". However such methods would be illegitimate if, for example highly intrusive non-accepted medical practices would be used, or such test would be directed to eliciting responses which are essentially testimonial. In that regard, for example, the US Supreme Court clarified already in its 1966 case of *Schmerber v. California* (384 U.S. 757) that "*to compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment*" and citing the obligatory use of lie detectors as such an example. In that regard also the ECtHR dismissed fairness of procedures where evidence was extracted from the body of the suspect with forceful medical emetics (*Jalloh v. Germany*, 2006).

(b) Reversal of burden of proof

In Article 5(2) the Commission text allows presumptions that shift the burden of proof. Such a referral is based on the ECHR *Salabiaku*, 1988, *Telfner*, 2001 and *O'Halloran and Francis v. UK*, 2007 cases. However, the Rapporteur is of the opinion that the inclusion of Article 5(2) does not reflect the very specific particularities of the mentioned cases - possession of prohibited goods in *Salabiaku*, referral to the free assessment by courts and prima facie evidence in the *Telfner* case (where a violation has been found) or the specific regime for traffic offence in *O'Halloran and Francis* allowing a presumption that the owner of the car is the driver. Such inclusion in a legislative text does not reflect adequately the particularity of the mentioned ECHR case-law, on one hand, neither does it take into account the danger connected with the inclusion of a presumption clause reversing the burden of proof in the operative part of a legislative text, on the other hand.

In that regard remarks about the recently adopted Directive 2013/48/EU on access to a lawyer should be taken into account as regards the inclusion of very broad general exemptions from the right to a lawyer (Article 3(6) of the mentioned Directive)¹ based on very specific ECtHR

¹ 6. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons:

(a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity

case-law. It was claimed that such a broad legislative exception does not take into account the particularity of very specific ECtHR case-law, and even runs into the danger of not taking into account future changes of ECHR case-law and thereby triggering an inconsistency between EU law and ECtHR case-law, whereby EU law could fall under the ECHR minimum.

At the same time the transformation of very particular case-law (such as *Salabiaku*) into a general legislative presumption runs also into the danger to create, on one side, a negative development in Member States with higher standards (despite the non-regression clause), as well as to trigger a minimum approach to such rights in the law of EU candidate or future candidate states. Consequently, Article 5(2) should be deleted from the text or entirely re-written.

(c) Admissibility of evidence

Several parts of the Commission proposal include an admissibility rule (Article 6(4), Article 7(4) and Article 10). As a general matter common EU rules on admissibility are welcomed and are a direct consequence of harmonizing procedural rights. As any harmonization of procedural rules without addressing the consequences of their violations stays a *lex imperfecta*. In that regard a common EU admissibility rule already exists in Article 12(2) of Directive 2013/48/EU on access to a lawyer. However, the standards used shall be again very high standards and at least, as a minimum, the ECtHR case law shall be respected.

The Commission refers in its proposal to inadmissibility as a consequence of a breach of the right to remain silent and the right not to incriminate oneself, *"unless the use of such evidence would not prejudice the overall fairness of the proceedings"*. However, such a definition does not take into account very clear ECtHR case-law regarding evidence obtained by a violation of Article 3 ECHR (torture, inhuman and degrading treatment). The ECtHR, for example in the case of *Gäfgen v. Germany* (even by the ECtHR Grand Chamber) established a very clear theory on absolute non-admissibility and exclusionary rule in cases of direct statements obtained by a violation of Article 3 ECHR, as well as indirect evidence stemming out of torture. The theory has been recently summarised again in *El-Haski v. Belgium* stating that (para. 85) *"the use in criminal proceedings of statements obtained as a result of a violation of Article 3 – irrespective of the classification of the treatment as torture, inhuman or degrading treatment – renders the proceedings as a whole automatically unfair, in breach of Article 6" and that "this also holds true for the use of real evidence obtained as a direct result of acts of torture (ibid., § 173); the admission of such evidence obtained as a result of an act qualified as inhuman treatment in breach of Article 3, but falling short of torture, will only breach Article 6, however, if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence"*.

Consequently, if the right to remain silent or right against self-incrimination were breached by a violation of Article 3 ECHR evidence has to be absolutely excluded and no weighting (comparison between the illegality and its influence of the fairness), as proposed by the Commission (*unless the use of such evidence would not prejudice the overall fairness of the*

of a person;

(b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.

proceedings), is possible anymore. Therefore, the Commission proposal is not in line with the ECtHR minimum requirements in that regard.

However, as EU rules should be very high rules, it would be more appropriate to introduce even higher standards as the current ECtHR minimum as described above. In that regard the Rapporteur would like to point out to the partly dissenting opinion by several ECtHR judges in the *Gäfgen* case stating that a violation of Article 3 ECHR shall trigger always a direct exclusion of all evidence (direct and indirect, without the distinction between torture, on one side, and inhuman and degrading treatment, on the other side, as regards indirect evidence). At the same time the same approach was proposed by a minority even for other ECHR violations, such as violations of Article 8 ECHR (the right to privacy) - see dissenting opinion of judge Loucaides in *Khan v. UK, 1999*. Such an approach already exists in some EU Member States.

Summary

The proposed directive on the presumption of innocence represents one of the corner stones of a modern EU criminal procedural law based on a high level of respect for fundamental rights. However, due to the points mentioned above, the current initial Commission proposal demands in the opinion of the Rapporteur certain important modifications.